

Selected Documents from Claim File

Claim No. LRF-2000-0515-02

Claim Amt. : \$2,189.31 Initial Entry Date : 05/23/2000

Claimant : Salt Lake Winnelson Co.

Property Desc. : Not Provided

Property Addr. : 2082 Marwood Dr

Salt Lake City, UT 84124

STATUS : DENIED (ORIGINAL CONTRACTOR UNLICENSED)

Associated Addresses

Type : Claimant Legal Counsel

DOPL # : - -

Firm Nm :

Name : Daniel O. Duffin

311 S State St Ste 380

Salt Lake City, UT 841115215

(801) 531-6600

Type : Claimant Address

DOPL # : 00-356118-5550

Firm Nm : Salt Lake Winnelson Co.

Name :

475 W 3440 S

Salt Lake City, UT 841154227

(801) 269-0400

Type : Home Owner - Primary

DOPL # : - -

Firm Nm :

Name : James A. Giaugue III

2082 Marwood Dr

Salt Lake City, UT 84124

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Type : Non-Paying Party - Primary

DOPL # : 00-270081-5501

Firm Nm : Ellsworth Plumbing, Inc.

Name : David J. Ellsworth

PO Box 801

Kaysville, UT 840370801

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Type : Original Contractor/Developer

DOPL # : - -

Firm Nm : Kirkham Properties, LLC

Name : Kent S. Kirkham

4636 Sycamore Dr

Salt Lake City, UT 84117

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DEMOGRAPHIC INFORMATION

Claim #: LRF-2000-0515-02 Claimant: Salt Lake Winnelson Co.

DOPL Licensee: no

Entity Type: Corporation

Number of Employees: 5-9

Gross Annual Revenue: 1M-4.99M

Years In Business: 10-19

Claiming Capacity: Supplier

NON-PAYING PARTY

DOPL Licensee: yes

Entity Type:

===== CLAIMS PROCESSING INFO =====

	Date Recieved	Date Forwarded
Front Desk	05/15/2000	
LRF Special-Setup,Filing,CRIS	05/23/2000	
Permissive Party Response	06/22/2000	DEADLINE*****
Screen C/D Letter	05/19/2000	06/26/2000

Comments Page: 001 UserID: ewebster

Conditional Denial letter sent May 19, 2000 with response deadline of June 19, 2000.

Reason for Conditional Denial:

1. Failure to pay \$75 claim-processing fee.

2nd Conditional Denial letter sent June 26, 2000 with response deadline of July 26, 2000.

Reasons for 2nd Conditional Denial:

1. Original Contractor not licensed
2. Certificate of Service is incomplete
3. No information regarding nature, timing, and amount of qualified services
4. Unable to calculate 180-day requirement
5. No evidence claimant has exhausted remedies

Claimant Response C/D Letter	07/27/2000	07/26/2000
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Comments Page: 001 UserID: ewebster

Claimant provided timely response to 2nd Conditional Denial. Response is adequate to complete claim.
Processing claim for Board review.

Substantive Review 07/28/2000

Comments	Page: 001	UserID: ewebster
Claim is complete. However, Examiner is unable to make a recommendation as to whether the claim should be paid. As detailed in the Required Factual Findings, some question remains as to whether the Original Contractor was licensed and the Homeowner paid in full. The Board is asked to carefully review these issue.		
The Examiner believes the requirements of a licensed contractor and payment in full cannot both be met (see Factual Findings). However, if the Board finds these requirements can be met, the claim should be paid in the amounts shown on the Payment Checklist.		
Claim Disposition	Deny	08/17/2000
Board Disposition		***
JURISDICTIONAL CHECKLIST =====		
Completion Of QS	03/29/1999	
Civil Bkcy Filing	07/26/1999	
Difference	119	
Comments	Page: 001	UserID: ewebster
Qualified service date per invoices (pg 33 - 39)		
Civil action filing date per NCA (pg 21)		
Civil Judg/Bkcy Filing	01/19/2000	
LRF App Filing	05/15/2000	
Difference	117	
Comments	Page: 001	UserID: ewebster
Judgement entry date per judge's signature (pg 16)		
Claim filing date per DOPL date stamp (pg 1)		
===== COMPLETE APPLICATION CHECK-LIST =====		
Form Submitted	Yes	05/15/2000
Form Completed	Yes	07/27/2000
Fee	Yes	05/24/2000 0000-03-8679 ICN
Signed Cert/Aff	Yes	05/15/2000
Cert of Service	Yes	07/27/2000
Demog. Questionnaire	Yes	05/15/2000
===== SUPPORTING DOCUMENTS =====		
Written Contract	Yes	Written Contract 10/30/1998
Licensing Statute	Inc	License
Page: 3		

Full Payment	Yes	Affidavit Ind/Evidence	04/17/2000
Civil Action/Bankrupt	Yes	Complaint	07/26/1999
Entitlement to Pmt.	Yes	Civil Judgment	01/19/2000
Exhaust Remedies	Yes	SO/RS/WE/RE	05/30/2000
===== REQUIRED FACTUAL FINDINGS CHECK-LIST =====			
Claimant Qualified Beneficiary	Yes		
Comments	Page: 001	UserID: ewebster	
Claimant is a supplier and registered with the Fund February 27, 1998.			
Written contract exists	Yes		
Comments	Page: 001	UserID: ewebster	
Claimant provided complete copy of contract executed between Homeowner and Original Contractor (pg 25 - 26).			
Contract is for remodel of and addition to an existing residence. Contract is signed by all required parties.			
Original Contractor Licensed	Bd		
Comments	Page: 001	UserID: ewebster	
The contract (pgs 25 & 26) identifies the contracting parties as James A. & Cindy Ciaueque as homeowners/buyers and Kirkham Properties as contractor. At the foot of the contract is noted "Kent S. Kirkham. General Contractor." The contract is signed by Kent S. Kirkham acting as "owner" and by James A. Giauque.			
According to Division of Corporations, Kirkham Properties was organized as a domestic limited liability company. The name Kirkham Properties has never been registered as a DBA for any entity.			
DOPL records show Kirkham Properties has not been licensed as a contractor either as a DBA or as an LLC. However, Kent S. Kirkham has held contractor license #283838-5501, as a sole proprietor, since June 16, 1993. That license is still active & in good standing.			
As proof Homeowner paid Original Contractor in full, Claimant submitted a copy of a letter from Kirkham Properties LLC to James A. Giauque. The letter reads:			
Jim,			
Just a note to verify you have paid in full Kirkham Properties LLC for all the remodel work done on your home at 2028 Marwood Drive. We appreciate the timely payments as the work progressed.			
Sincerely,			
Kent S. Kirkham			
(Owner/Builder)			
Claimant's explanation of this matter is as follows:			
a. [LRF states] the contract clearly shows that the contracting parties were Kirkham Properties, LLC. The contract . . . identifies as Kirkham Properties, Kent Kirkham dba Kirkham Properties, not Kirkham Properties, LLC. The contract is signed by "Kent S. Kirkham/owner." There is no title of manager or member which would be the proper designation if it was an LLC.			
b. It should also be noted that the Division of Corporations has suspended Kirkham Properties, LLC. Upon suspension a company is no longer in business under that name and it is automatically doing business under the dba of Kent S. Kirkham. To our knowledge the contract, at all times, was with Kent S. Kirkham dba Kirkham Properties. Kent S. Kirkham was the general contractor and is licensed.			
Page: 4			

c. In addition, the Residence Affidavit is signed by James A. Giauque as the homeowner and identifies that his written contract was with Kent S. Kirkham dba Kirkham Properties. All parties to this contract understood that is was not the LLC for which business was being done, and thus it cannot be argued that Kirkham Properties LLC was using teh contractor's license of Kent S. Kirkham or was with whom the contract was made. It is clear that the homeowner entered into a written contract with a licensed contractor, Kent S. Kirkham.		
Examiner is unable to make a determination as to whether Original Contractor should be treated as properly licensed and solicits the Board's advice.		
Owner PIF to Contractor Bd		
Comments	Page: 001	UserID: ewebster
Original Contractor provided Homeowner with a signed receipt showing the contract had been paid in full (pg 28).		
Note: payment was to Kirkham Properties, LLC (see info regarding whether Original Contractor was licensed). If contract was with Kent S. Kirkham dba Kirkham Properties then Homeowner has not paid in full.		
Residence Own/Occ as defined Yes		
Comments	Page: 001	UserID: ewebster
Homeowner provided a complete Owner-Occupied Residence affidavit (pg 24). Affidavit shows construction was completed November 15, 1999 and residence was occupied before, during, and immediately after construction.		
Residence Single Family/Duplex Yes		
Comments	Page: 001	UserID: ewebster
Per Owner-Occupied Residence affidavit.		
Contract For QS Yes		
Comments	Page: 001	UserID: ewebster
Claimant submitted copies of invoices issued to NPP (pg 33 - 39). Invoices show Claimant provided plumbing materials for use by NPP in construction on incident residence.		
Claimant brought Civil Action Yes		
Comments	Page: 001	UserID: ewebster
Default judgement in favor of Claimant and against NPP was entered January 19, 2000.		
Exhausted Remedies Yes		
Comments	Page: 001	UserID: ewebster
Claimant issued Supp Order May 30, 2000. Return of Service dated June 6, 2000 shows Supp Order could not be served because NPP has moved to California and current address is not known (pg 47 - 49)		
Page: 5		

Adequate \$ in LRF Fund			Yes
Statutory Limit/Payment			no
Comments	Page: 001	UserID: ewebster	
Total payment for incident residence to date: \$0.			
Exceed Monetary Cap			No
Comments	Page: 001	UserID: ewebster	
Total payments to Claimant to date: \$0			
Un-reimbursed Payments			no
Comments	Page: 001	UserID: ewebster	
To date Fund has paid \$0 of claims on behalf of Claimant and has received \$0 of reimbursements.			
===== PAYMENT CHECKLIST =====			
	Apportioned %	Claimed	
	100.00		
Principal Amount	2,161.98	2,189.31	
Pre Attorney Fees	106.77	0.00	
Pre Costs	16.83	0.00	
Pre Int. % 0.00	16.83	0.00	
Post Attorney Fees	0.00	0.00	
Post Costs	0.00	0.00	
Post Int. % 0.00	0.00	0.00	
Total	2,590.51	2,189.31	
QUALIFIED SERVICES COMMENT			
Comments	Page: 001	UserID: ewebster	
Qualifies service amount per invoices (pg 33 - 39). Disallowed portion is a service charge which does not meet definition qualified services (see Utah Code Ann. 38-11-102(16) and 38-11-203(3)(b))			
PRE JUDGEMENT ATTORNEY FEE COMMENT			
Comments	Page: 001	UserID: ewebster	
Total attorney fees per judgement = \$996 (pg 44 - 45). Amount allocated among related claims based on qualified services amount.			
PRE JUDGEMENT COSTS COMMENT			
Page: 6			

Comments	Page: 001	UserID: ewebster
Total pre-judgement costs per judgement = \$157. Amount allocated among related claims based on qualified services.		
PRE JUDGEMENT INTEREST COMMENT		
Comments	Page: 001	UserID: ewebster
Per Utah Code Ann 38-11-203(3)(c) interest calculated at 12% from payment due date to claim approval date net of delays attributable to the claimant.		
DATES FOR THIS CLAIM:		
Payment Due Date: April 29, 1999 per invoice--interest begins this date		
1st Conditional Denial: May 15, 2000--interest suspended this date		
1st Claimant Response: May 24, 2000--interest resumes this date		
2nd Conditional Denial: June 26, 2000--interest suspended this date		
2nd Claimant Response: July 27, 2000--interest resumes this date		
Board Hearing: August 9, 2000--interest terminates this date		
POST JUDGEMENT ATTORNEY COMMENT		
POST JUDGEMENT COSTS COMMENT		
POST JUDGEMENT INTEREST COMMENT		
===== DISPOSITION CHECKLIST =====		
CLAIM DENIED: Yes		
Amount Denied: 2,189.31		
Division Order Date: 08/14/2000		
Department Order Date:		
Appeal Deadline to Dept.:		
Appeal Deadline to Courts.:		
Status on Appeal: ?		
Status on Appeal - CT: ?		
AG Subrogation Referral Date:		
Date Judgement Assigned to DOPL:		
Amount Collected in Subrogation		
Costs:	0.00	
Fees:	0.00	
Interest:	0.00	
Civil Penalty:	0.00	
Interest:	0.00	
Total:	0.00	
Status of Subrogation:		
Payment Request Date:		
Finet Document Number:		
Finance Transaction Date:		
NPP Reimbursement Demand Date:		
NPP Reimbursement Deadline Date:		
Date Reimbursement Received:		
Amount:	0.00	
Date Investigation Report Updated:		
Status of Investigation:		
Page: 7		

Minutes from Board Meeting Discussion
Claim No. LRF-2000-0515-02

August 9, 2000

The claimant's attorney, Daniel Duffin, was present. The original contractor is licensed as Kent Kirkham. However, the contract between the homeowner and the original contractor is with an unlicensed entity, Kirkham Properties LLC. Discussion pursued regarding licensing and the education of homeowners. Will a homeowner know he has not signed a contract with a licensed contractor as in the previous example? Mr. Burton indicated that contractors are often advised to create an LLC without understanding why. He wondered if the board was getting hyper technical on this matter. Mr. Hunt indicated that he had discussed *equitable powers* with the board in the past. District courts have equitable powers; the division (or board) does not. Even though board members may feel that the claim should be approved, they do not have the authority to make those exceptions. He cited UCA § 55-58-301(1)(a), which says:

Any person engaged in the construction trades licensed under this chapter, as a contractor regulated under this chapter, as an alarm business or company, or as an alarm company agent, shall become licensed under this chapter before engaging in that trade or contracting activity in this state unless specifically exempted from licensure under Section 58-1-307 or 58-55-305.

The licensee needs to list his dba's with DOPL and the Division of Corporations. There is no registration for Kirkham Properties LLC. Mr. Duffin asked how the homeowner is to know the process for this. Mr. Bankhead indicated that this puts a further burden on the homeowner who does not fully understand the process. He said that in many cases the subcontractor might not understand the process either. Mr. Jensen asked if the permitting agencies were policed by the state. Mr. Cottle explained that some of the agencies do confirm that a contractor has a current, valid license before issuing permits; others did not. Mr. Duffin indicated that there were possible four claims and he was unsure whether the \$75 fee would cover all four claims. Mr. Webster explained that the position of the program was to give the claimant every opportunity. When a claim is filed without a fee, the claim is logged into the system and a conditional denial letter is generated and sent to the claimant indicating that without payment of the fee, the claim will be denied. This allows incomplete claims to be filed to preserve the 120-day filing date within the time period. Mr. Walker indicated that he agrees with Mr. Hunt's interpretation of the powers of the board. The confusion of names, corporations, and distinctions of such trouble him. How can the unsophisticated homeowner be expected to see through all this? He indicated that it would be a good task force matter. Mr. Burton asked the attorneys present if there was a way to interpret the statute to make the claim payable. The attorneys agreed that there was not. Mr. Duffin indicated that he felt the board was splitting hairs. He understands their inability to pay but feels that it is clear Kent Kirkham and Kirkham Properties LLC are the same person and/or company. In response to discussion of a way to "fix" this problem, Mr. Patterson asked the board to be aware that they may not want the responsibilities of equitable powers. Mr. Duffin indicated that the homeowner affidavit indicates that he dealt with Kent Kirkham dba Kirkham Properties, and that the affidavit was signed by the homeowner. Mr. Cottle explained that contractor licenses are issued to entities not individuals. For purposes of explanation, he said that Burton Inc dba Burton Contracting would be a legal dba. However, if Burton Inc did work as Bob's Contracting, he would be subject to citation as an unlicensed contractor. Mr. Hunt

indicated that the previous example was an easy example. What the law is intended to protect is when a less than honest business registers a name that is only one word or even one letter different than a reputable, reliable business. The laws are to protect honest contractors. Mr. Duffin thought that a court with equitable powers would rule that Kent Kirkham and Kirkham Properties as the same entity. He could get an amended judgment and bring the claim back to the board. Mr. Webster indicated that the board is bound by the ruling and could recognize alterations from a district court ruling, but could not determine the fact itself. Mr. Hunt reminded those present that the board simply does not have equitable powers. Mr. Bankhead moved to deny the claim because the board does not have the power to approve but wants the record to read that the board would like the equitable powers to make the determination that a claim should have been approved and paid. He also indicated that denying the claim was not in the best interest of homeowner or the claimant. Mr. Burton seconded the motion. All approved.

**BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

IN THE MATTER OF THE LIEN RECOVERY :	ORDER
FUND CLAIM OF SALT LAKE WINNELSON:	
CO. REGARDING THE CONSTRUCTION BY :	
KENT S. KIRKHAM d/b/a KIRKHAM :	Claim No. LRF-2000-0515-02
PROPERTIES and/or KIRKHAM :	
PROPERTIES, LLC ON THE RESIDENCE OF:	
JAMES A. GIAUQUE III :	

Pursuant to the requirements for a disbursement from the Lien Recovery Fund set forth in UTAH CODE ANN. § 38-11-203(3) (1998) and being apprized of all relevant facts, the Director of the Division of Occupational and Professional Licensing finds that the claimant has not complied with the requirements of UTAH CODE ANN. § 38-11-204(3)(a)(i) (1998) in that the original contractor was not licensed as required by UTAH CODE ANN. §§ 58-55-102(21), 58-55-301(1)(a) and 58-55-502(11) (1999). Specifically, the contract is between the homeowner and Kirkham Properties—the original contractor. The Division has no record of a contractor license for Kirkham Properties either as a d/b/a of Kent S. Kirkham or as a limited liability company.

WHEREFORE, the Director of the Division of Occupational and Professional Licensing orders that the above-encaptioned claim is denied.

DATED this 17 day of August, 2000.


A. Gary Bowen, Director

CHALLENGE AFTER DENIAL OF CLAIM:

Under the terms of UTAH ADMINISTRATIVE CODE, § R156-46b-202(j) (1996), this claim has been classified by the Division as an informal proceeding. Claimant may challenge the denial of the claim by filing a request for agency review. **(Procedures regarding requests for agency review are attached with Claimant's copy of this Order).**

MAILING CERTIFICATE

I hereby certify that on the 21 day of August, 2000, a true and correct copy of the foregoing Order was sent first class mail, postage prepaid, to the following:

SALT LAKE WINNELSON CO
475 W 3440 S
SALT LAKE CITY UT 84115-4227

Claimant

DANIEL DUFFIN ESQ
311 S STATE ST STE 380
SALT LAKE CITY UT 84111-5215

Counsel for Claimant

DAVID J ELLSWORTH
ELLSWORTH PLUMBING INC
PO BOX 801
KAYSVILLE UT 84037-0801

Non-Paying Party

Kathie Schwab
Kathie Schwab, Board Secretary